CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Western Wisconsin	2	1
Excerpts from proceedings of October 25, 1945	2	1
Appearances	2	1
Motion to withdraw certain defenses and order thereon	2	1
Excerpts from argument of Mr. daPonte on behalf of the plaintiff	3	2
Excerpts from argument of Mr. Margolies on behalf of the defendant	4	3
Reporter's certificate (omitted in printing)	8	
Memorandum opinion, Stone, J.	8	7
Findings of fact and conclusions of law	18	18
Judgment	35	36
Notice of appeal	36	37
Statement of points	37	37
Cost bond (omitted in printing)	39	
Stipulation for inclusion of additional material for supplemental record	41	39
Designation of record	42	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 23, 1946

	Original	Print
Record from D. C. U. S., Western Wisconsin—Continued		
Clerk's certificates (omitted in printing)	43	
Stipulation for printing the record	45	41
Clerk's certificate (omitted in printing)	47	
Proceedings in U. S. C. C. A., Seventh Circuit	49	42
Appearances	49	42
Argument and submission	51	42
Opinion, Minton, J.	52	43
Judgment	58	49
Clerk's certificate (omitted in printing)	59	
Order granting certiorari	60	49

[fol. 1] [Caption omitted]

[fol. 2]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action. File No. 90 (Superior)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

Excerpts From Proceedings

had on the hearing of the above-entitled cause, in said Court, sitting in the City of Wausau, in said Western District and State of Wisconsin, the Honorable Patrick T. Stone, Judge, presiding; said cause having come on for hearing on Friday, the 25th day of October, 1945, at 9:30 o'clock in the forenoon.

APPEARANCES:

Messrs. Johnson, Fritschler & Barstow, by Mr. Barney Barstow; Mr. M. L. Countryman, Jr., and Mr. L. B. daPonte, on behalf of the plaintiff.

Mr. Charles H. Cashin, United States Attorney; Mr. Hubert H. Margolies, Attorney, Department of Justice, on behalf of the defendant.

MOTION TO WITHDRAW CERTAIN DEFENSES

Mr. Margolies: Mr. Cashin and I have reviewed the defenses to the various claims set forth in the complaint, and we have concluded that the claim set forth in paragraph 4 of the complaint, relating to shipments of coal from Kleenburn, Wyoming, to Fort Missoula, Montana, were for the purpose of heating the Fort while Italian seamen were being detained, rather than interned, in July of 1941; and, because, in our view, detention in time of peace is not the equivalent of internment, we are withdrawing the Govern-
[fol. 3] ment's defense to the claim set forth in paragraph 4. So that that is now out of the case.

The Court: And wisely so. I think your judgment is good on that. It may be withdrawn.

Mr. Margolies: Well, we felt that in all candor we should.

The Court: Yes, I think so.

EXCERPTS FROM THE ARGUMENT OF MR. daPONTE ON BEHALF OF THE PLAINTIFF

Mr. daPonte: Now, the next item is plumbing fixtures. The plaintiff has withdrawn that item, because I supposed when we selected it that the plumbing fixtures were also for the use of the contractor's men, but it seems that——

The Court: Do you mean out there at the internment camp?

Mr. daPonte: No, out there at Dutch Harbor, Alaska, the same place these bowling alleys were shipped. I thought they were also for the contractor, but it seemed they were to be installed in naval barracks.

The Court: Well, from my reading of the briefs, the shipment of that coal out to the internment camp is necessarily under a different category from the toilets used by these men.

Mr. daPonte: Oh, yes, they are; but as we say in the brief, it presents probably a borderline question as to whether these fixtures were construction materials or whether they were articles to be ready for use.

The Court: They were shipped after war had been declared.

Mr. daPonte: Well, let's see—I don't recall, but I don't think that would make any difference. It would be military property if for the use of military personnel in time of peace the same as in time of war; it wouldn't make any difference.

So I didn't want to split any hairs with the Government on that. If you treat them as construction materials, you have got one question; if you treat them like a kitchen stove or range for use of the armed forces, you have got another question. So we just gave them the benefit of being like articles of any other equipment or supplies that belong to the armed forces, because we don't need that particular shipment, anyway, because we have other shipments that present all the questions we are concerned with.

[fol. 4] EXCERPTS FROM THE ARGUMENT OF MR. MARGOLIES ON BEHALF OF THE DEFENDANT

Mr. Margolies: Now, because of the importance of this cost-plus shipment, if there is any question being raised as to the passage of title to the United States—a point that was not raised until we were served with the reply brief on behalf of plaintiff—I would like the privilege of filing a brief devoted exclusively to the passage of title to the United States—that is, if plaintiff in his rebuttal argument indicates that he is seriously questioning that title to the lumber that was shipped to the Twin Cities Ordnance Plant was in the United States.

* * * * * * *

Mr. Margolies: Now, coming back to the question of whether the United States had title to the lumber that was shipped to the Twin Cities Ordnance Plant, Colonel Lasker, who represents the War Department before the various committees of Congress, described in a very lucid fashion the practice of the War Department with reference to title and land grant rates. He said:

> "There has been a considerable amount of negotiation of contracts, as you all know; and under the negotiation of contracts or whatever type of contract it might be, we have written into most of them a saving clause to the Government, to the War Department, of the authority to take title to goods used in the manufacture of the particular item at the point of origin, or to furnish to the contractor the raw material, if you will, or the parts that go into its finished product; so that on, we will say, a cost-plus-fixed-fee contract a good deal of the material procured and going into the manufacture of the finished product moves on a commercial bill of lading and does not necessarily take land grant rates. However, the contract is so written that the War Department may take title to the materials at the point of origin and ship them on a Government bill of lading, thereby taking advantage of the land grant rates.
>
> "So, when this property is moving to the contractor's plant, it might move on a Government or it might move on a commercial bill of lading. If it

moves on a commercial bill of lading and arrives at destination, then the contractor and probably a representative of the contracting officer"—

[fol. 5] that is, the War Department man,

"decides whether or not that commercial bill of lading should be converted to a Government bill of lading, and that decision is based on the application or non-application of land grant rates for that particular haul. So we have a saving clause in these contracts, where we can take advantage of the lesser cost of transportation where it is applicable and where it is appreciably less; so, regardless of the kind of contract, whether it be on a bid basis, or whether it be a negotiated contract or a cost-plus-fixed-fee basis, we have provided this so that we may take advantage of the lowest transportation costs available."

The practice of the War Department is set forth in these Army Regulations, of which I have a copy here, and in two sentences we can see what the practice of the War Department is. This is Army Regulations No. 55,150, and on page 14 the following appears:

"Transportation of military or naval property of the United States moving for military or naval use is subject to land grant rates where applicable. Transportation of other property is not."

And then, in italics:

"Land grant rates are not available on property belonging during transit to vendors, contractors, cost-plus contractors, or others, regardless of the form or kind of bill of lading used."

Now, the War Department has an understanding, because of the fact that throughout the history of land grant rates the negotiations with the railroad were always handled through the War Department; and in those instances in which the Government is entitled, when the War Department claims the benefit of land grant rates, it is invariably on property which is owned by the United States. Now, if it will help your Honor, I will leave a copy of this——

The Court: I think not. Is there any reference to that in your stipulation, or not?

Mr. Margolies: There is no reference in the stipulation.

The Court: And does your stipulation provide that the Government is the shipper in all these cases at the point of origin, the origin of the shipment?

[fol. 6] Mr. Margolies: If I may venture to speak for Mr. daPonte, there is only a question as to this one shipment to Twin Cities Ordnance Plant. I don't know whether he is going to insist on that issue. He raised it in his reply brief for the first time, and I don't know whether he is seriously questioning that title wasn't in the United States.

The Court: Let's find out now.

Mr. daPonte: Well, what I said to your Honor was that under that contract there do-n't seem to be any question but what the title was not in the Government until they inspected and accepted the material. We don't think it is important whether it was shipped on Government bill of lading or not. Under this contract it is expressly provided——

The Court: Is that the shipment to Foley Brothers?

Mr. daPonte: Yes, sir. That was all I knew about it. I don't know anything about it——

The Court: What does the Governement contend?

Mr. Margolies: The Government contends that under the contract the Government reserves the privilege of furnishing material when it can get lower rates; and that the Government did get, from these lumber companies in Washington, the lumber which it shipped and which it owned, and it shipped it to Foley Brothers.

The Court: If the Government owned that lumber, then it was the shipper.

Mr. Margolies: The Government did own the lumber. The Government was shipper and consignee.

Mr. daPonte: No, you are in error there. The lumber company was the shipper.

Mr. Margolies: The lumber company was the shipper, but this was——

The Court: Shipped on the order of the Government?

Mr. daPonte: Foley Brothers was the consignee.

Mr. Margolies: Now, this was an f. o. b. point of origin shipment, so the title passed to the purchaser at the time they were loaded; so that, from the moment of loading,

the person having title was the United States, and our view is that the United States was the shipper.

The Court: The Government bought the lumber, and paid for it?

Mr. Margolies: The Government bought the lumber, and paid for it.

Mr. daPonte: Well, of course, that doesn't appear, Mr. Margolies.

[fol. 7] Mr. Margolies: It does appears that the procuring agency was the Government; that the purchases were made on purchase order allocations.

The Court: If you can't stipulate that, you had better get some evidence in.

Mr. daPonte: I don't know anything about it except what these gentlemen wrote in the stipulation in that regard, and I accepted the statement.

Mr. Margolies: This is a joint stipulation.

The Court: I notice the stipulation provides that either party may submit further evidence if they see fit.

Mr. daPonte: Yes, sir.

The Court: There is a saving clause:

> "It is understood that this stipulation shall in no way affect the burden of proof which rests upon one party or the other under established principles of law."

It is also provided that:

> "Either party may offer additional relevant evidence not inconsistent with this stipulation."

Mr. Margolies: Well, if your Honor will look at the top of page 12——

The Court: Of what?

Mr. Margolies: Of the stipulation.

Mr. daPonte: Page 14.

The Court: All right.

Mr. Margolies: (Reading from stipulation):

> "The Purchase Orders for lumber for the construction of Plant No. 2 and Plant No. 2 Expansion were issued against Purchase Allocations issued by the Office, Chief of Engineers, Washington, D. C. As contractors for the project Foley Bros., Inc., and Walbridge, Aldinger issued requisitions for purchase of the amounts

of lumber they estimated would be required. On receipt of such requisitions the Area Engineer advised the Office, Chief of Engineers, as to such requirements. That Office issued allocations therefor, and on receipt of such allocations, the contractor issued Purchase Orders to Vendors."

The Court: That seems to clear that up.

Mr. Margolies: Then:

"Title to all work completed or in the course of construction, and title to all materials, vested in the Government when designated by its Contracting Officer, and the Government reserved the right to furnish any [fol. 8] materials necessary for the completion of the work. The Office, Chief of Engineers, acted as a central procuring agency for lumber used in the construction of the ordnance plant and issued allocations for the purchase of said lumber."

The Court: Well, that wouldn't leave any doubt that the Government was the owner and the shipper of that lumber.

[Reporter's certificate to foregoing paper omitted in printing.]

IN THE DISTRICT COURT OF THE UNITED STATES

MEMORANDUM OPINION—Filed January 16, 1946

This is an action commenced under the Tucker Act (paragraph 20 of Section 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093 as amended, 28 U.S.C.A. 41 (20)) to recover from the defendant freight charges on interstate shipments of government property. Plaintiff submitted its bills to the defendant at published tariff rates. The defendant, claiming that land grant rates applied under Section 321 (a) of the Transportation Act of 1940, 49 U.S.C.A. 65(a), deducted the difference between the published tariff [fol. 9] rates and the land grant rates, in some instances from the original bills and in other instances from subsequent bills.

The facts have been stipulated by the parties, and the Court adopts the stipulation as its findings of fact.[1]

[fol. 10] The defendant denies liability and alleges that the shipments in dispute constituted transportation of military or naval property of the United States moving for military or naval and not for civil use, within the meaning of said Section 321 (a) of the Transportation Act.

[fol. 11] Plaintiff denies that the said shipments were military or naval property of the United States moving for military or naval and not for civil use, and contends that the defendant is not entitled to the land grant deductions it has taken on the shipments involved in this action.

[fol. 12] Plaintiff has withdrawn its claim as set forth in paragraph 12 of the stipulation (paragraph IX of the complaint), and defendant has admitted liability to plaintiff on the shipment described in paragraph 7 of the stipulation [fol. 13] (paragraph IV of the complaint). The total amount now claimed by plaintiff from the defendant in this action is $3,889.08.

---

[1] That part of the stipulation pertinent to the determination of the issues herein reads as follows:

"8. During the month of August, 1941, plaintiff, in connection with the New York, New Haven and Hartford Railroad Company, the Erie Railroad Company, and the Chicago and Northwestern Railway Company, transported on Government bill of lading N686622 from Pawtucket, Rhode Island, to Tacoma, Washington, in connection with contract NOs-88648, and plaintiff there delivered to the consignee 15,780 pounds of insulated copper cable shipped by the inspector of naval material, United States Navy, Boston, Massachusetts, consigned to District Material Officer, Thirteenth Naval District, c/o Seattle-Tacoma Shipbuilding Company for Maritime Commission, Hull 123.

"The insulated copper cable was furnished and transported by the Navy Department of the United States for the purpose of being used in the installation of degaussing equipment (to neutralize magnetic mines) on Hull No. 123. Hull No. 123 was a single crew cargo vessel built by the Seattle-Tacoma Shipbuilding Corporation pursuant to a contract entered into on October 9, 1939, between the Seattle-Tacoma Shipbuilding Corporation and the Maritime Commission of America.

[fol. 14] That portion of the statute pertinent to these proceedings reads:

> "Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to (the Act) * * * of any * * * property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

There is only one question for this Court to decide, and that is: Were the shipments of the government property described in the complaint and stipulation military or naval property moving for military or naval use and not for civil use?

The term "military use" will be considered for the present purpose as embracing naval use.

"In accordance with the provisions of subsection (b) of Section 501 of the Merchant Marine Act of 1936, as amended (46 U.S.C. Sec. 1151 (b)) the plans and specifications for the construction of Hull No. 123 were submitted to the Navy Department for suggestions as to changes that should be made, in order that the vessel might be suitable for conversion into a military or naval auxiliary or suitable to the United States in time of war.

"In 1940, while this vessel was under construction, it was determined by the Navy Department and the Maritime Commission that all vessels under construction by the Maritime Commission should have degaussing equipment. Discussions between the Navy Department and the Maritime Commission resulted in the adoption of the following procedure for equipping Maritime Commission vessels under construction:

> Degaussing specifications would be prepared by the Navy Department and transmitted to the Maritime Commission for forwarding to the Commission's ship contractor. Responsibility was placed on the Maritime Commission to make all necessary arrangements with the shipbuilders in accordance with the specifications furnished by the Navy Department. All degaussing

Webster's New International Dictionary, 2nd Edition, unabridged, defines the words "military" and "naval" as follows:

> "Military"—"of or pertaining to soldiers, arms or war; belonging to, engaged in, or appropriate to the affairs of war; according to the methods and customs of war or armies";
>
> "Naval"—"of or pertaining to ships or shipping; of or pertaining to or connected with, possessing or characteristic of vessels of war or a navy".

Black's Law Dictionary, 2nd Edition, at page 778, defines military as "pertaining to war or to the army; concerned with war".

The times, circumstances and conditions must all be considered in determining whether property is used for a military purpose. In times of war, the concept of "property for military use" takes on a wider range than in times of peace. Property which in times of peace or under ordinary conditions is usable for "non-military" purposes, must be

---

> equipment was to be furnished by the Navy Department, including additional generating capacity where necessary. The cost of the equipment together with the cost of transportation was to be borne by the Navy Department. During the installation of the equipment the Navy Department would act in an advisory capacity, providing technical information whenever necessary.

"Specifications for the degaussing equipment for Hull No. 123, later known as the S. S. Idaho, were furnished by the United States Navy Department, which acted in an advisory capacity in the installation, and assumed and paid for the cost of the degaussing equipment and all transportation costs.

"Article 9 of the Maritime Commission contract covering the sale of the vessel reads in part as follows:

> 'Until the emergency declared by the President of the United States in a proclamation dated September 8, 1939, shall cease to exist, the vessel shall be operated to and from such port or ports and under such conditions as the Commission shall direct.'" • • •

considered in times of war "military" when it is used for a military purpose. The test is whether the foremost purpose which the shipment is designed and intended to serve is a military purpose, and whether the civilian use is more than incidental.

[fol. 15] Military property includes all property of every kind and description intended for and used in connection with the conduct of the war. Modern science has changed weapons of warfare. Many articles and substances once considered unimportant for a belligerent purpose have become necessary and useful in the prosecution of the war. Military or non-military articles can be properly classified only after appropriate consideration has been given to the pressure and exigencies of the time, the current needs and circumstances of its use. Fishing tackle for use by vacationists is civil property, but manifestly becomes military when packed in a life raft for use by airmen downed at sea. Copper cable, as such, is not necessarily military property. However, under particular conditions of war or defense,

---

"9. During the months of January and February, 1942, plaintiff transported over its own line, on commercial bills of lading, from Longview, Whites, Everett, and Shelton, Washington, to New Brighton, Minnesota, and there delivered to the consignee, seven carloads of lumber, shipped by various lumber companies, consigned to the U. S. Area Engineer, Twin Cities Ordnance Plant, in care of Foley Brothers, Inc., and Walbridge, Aldinger Company, . . .

"Twin Cities Ordnance Plant at New Brighton, Minnesota, was constructed for the United States, under authority of the Secretary of War, for the manufacture of .30 and .50 caliber ammunition pursuant to a cost-plus-fixed-fee construction and operation contract, Contract No. W-ord-527, entered into in July, 1941, with the Federal Cartridge Corporation of Minneapolis, Minnesota. The plant was constructed on a site furnished and made available by the Government, which is, and at all times has been, the owner of the plant facility known as Twin Cities Ordnance Plant. Foley Bros. and Walbridge, Aldinger Company, as a Joint Venture, were the authorized and approved subcontractors for the construction services. The plants were to have an average daily capacity based on twenty-four (24) hours of operation per day, of 2,000,000 rounds of caliber .30 ammunition and 600,000 rounds of caliber .50 ammuni-

it may become indispensable to military functioning when owned by the United States and devoted to a war use. It then acquires the character of military property.

The shipment of bowling alley equipment was originally intended to serve as a recreation center for the civilian employees of the contractor and later as a recreation center for military personnel occupying the station. The construction work performed by the contractor and his men was essential to the war effort and was so regarded by the Navy Department. The remoteness of the station in Alaska, the disagreeable weather, difficult working conditions, and the boredom of off-hours necessitated special measures to keep the employees satisfied and willing to remain at the station. The structure which was to house the bowling alley was completed in December, 1942, when all civilian workmen were evacuated and the construction work was taken over by the Seabees. At Dutch Harbor, where the alleys were installed, the lands and buildings are all owned by the United States and operated as a naval establishment, and all non-military activities are excluded. Clearly the alleys fulfilled a military function in maintaining the efficiency,

---

tion. By supplemental contract in January, 1942, the plant was expanded to provide a capacity of 5,000,000 rounds of caliber .30 and 1,600,000 rounds of caliber .50.

"Construction of the plant project was under the supervision of the Quartermaster Corps, United States Army, from July 17, 1941, to December 15, 1941. Thereafter, all construction work at the Project was under the supervision of the Corps of Engineers, United States Army. The plant was constructed in three parts, known as Plant 1, Plant 2, and Plant 2 Expansion. The buildings of Plant 1 were constructed largely of steel, brick and concrete and were substantially complete on or about June 30, 1942. Plant No. 2 and Plant No. 2 Expansion were started January 7, 1942, and completed on or about January 15, 1943. They consisted of several large manufacturing buildings with the necessary additional buildings, all of good construction.

"The Purchase Orders for lumber for the construction of Plant No. 2 and Plant 2 Expansion were issued against Purchase Allocations issued by the Office, Chief of Engineers, Washington, D. C. As contractors for the project Foley Bros., Inc., and Walbridge, Aldinger issued requisitions for purchase of the amounts of lumber they estimated

morale and physical fitness of the military men at this remote outpost, and are military or naval property, and were moved in interstate commerce for military and not for civil use.

In May, 1943, plaintiff transported to Minneapolis, Minnesota, consigned to the Depot Quartermaster for the United States Marine Corps, the lumber referred to in paragraph 10 of the stipulation for manufacture into trestle and pon- [fol. 16] ton balks for use of the United States Marine Corps. The lumber used in the manufacture of the trestle and ponton balks was carefully selected, assembled and shipped by the Marine Corps. The trestles and balks manufactured from the lumber are components of pontons or demountable floating bridges required to move military personnel and vehicles of war across water barriers. Some of the trestle and ponton balks so manufactured were shipped and used in military operations overseas, and some were used for training of combat engineers at Camp Lejeune, North Carolina, and at Quantico, Virginia. The lumber used to manufacture these components was unquestionably military property.

---

would be required. On receipt of such requisitions the Area Engineer advised the Office, Chief of Engineers, as to such requirements. That Office issued Allocations therefor, and on receipt of such allocations, the contractor issued Purchase Orders to Vendors.

"All of the lumber shipments in question were used in the construction of Plant 2 and Plant 2 Expansion. Title to all work completed or in the course of construction, and title to all materials, vested in the Government when designated by its Contracting Officer, and the Government reserved the right to furnish any materials necessary for the completion of the work. The Office, Chief of Engineers, acted as a central procuring agency for lumber used in the construction of the ordnance plant and issued allocations for the purchase of said lumber. Since January, 1943, the ordnance plant has been engaged in the manufacture of .30 and .50 caliber ammunition for use by the armed forces of the United States in the present emergency." • • •

"10. On or about May 10, 1943, plaintiff transported over its own line of railroad on Government bill of lading No. M-121708-43 from Bucoda, Washington, to Minneapolis,

In August, 1941, when our involvement in the war was imminent, plaintiff transported for the Navy Department to Tacoma, Washington, in interstate commerce, insulated copper cable for use by the Navy in the installation of degaussing equipment on Hull No. 123, a cargo vessel later known as the S. S. Idaho. Hull No. 123 was built pursuant to a contract entered into on October 9, 1939, between the shipbuilding company and the Maritime Commission. In accordance with Section 501 (b) of the Merchant Marine Act of 1936, as amended, 47 U. S. C. A. 1151 (b), the plans for the construction of Hull No. 123 were submitted to the Navy Department for changes necessary for the vessel to be readily converted into a military or naval auxiliary. While this vessel was under construction in 1940 the Maritime Commission and the Navy Department agreed that all vessels under construction by the Maritime Commission, as this one was, should have the defense feature, the degaussing equipment, to counteract magnetic mines. The Navy Department furnished the specifications for this equipment and paid for its installation on Hull No. 123 as a necessary defense measure. This vessel so equipped was essential to and was used in the conduct of the war. The copper cable comes within the category of military or naval property.

Minnesota, and there delivered to the consignee, 113,120 pounds of fir lumber loaded in car No. PLE46525, shipped by Mutual Lumber Company, consigned to Depot Quartermaster, Aaron Carlson care Crown Iron Works, at Minneapolis, Minnesota, for United States Marine Corps.

"The lumber was shipped to be urea salts treated, kiln dried, milled and manufactured into trestle balks and ponton balks, sills, and chess, at the Crown Iron Works at Minneapolis. The balks, sills and chess are necessary members of a certain type of ponton or demountable floating bridge required to move military personnel and vehicles of war across water barriers. The trestle and ponton balks manufactured from the lumber shipped in Car No. PLE46525 are now overseas in connection with military and naval operations or have been used in construction of ponton bridges and temporary piers used at Camp Lejeune, North Carolina, and Quantico, Virginia, for training of combat engineers." • • •

"11. On or about February 13, 1942, plaintiff and its connecting carriers, the Grand Trunk Railroad and the Chicago

In January and February, 1942, the plaintiff transported lumber purchased and shipped by defendant in interstate commerce to New Brighton, Minnesota, consigned to the United States Area Engineer, Twin Cities Ordnance Plant, to be used in the construction of buildings for the Twin Cities Ordnance Plant on land owned by the United States Government. The construction was done under the author- [fol. 17] ity of the Secretary of War, and under the supervision of the Corps of Army Engineers. The plant was to be used to manufacture .30 and .50 caliber ammunition pursuant to a cost-plus-fixed-fee contract. The ordnance plant then in operation was engaged in the manufacture of .30 and .50 caliber ammunition for our armed forces. The lumber was shipped and used for a specific purpose,—to construct a public arsenal which would provide more small arms ammunition for the army. The arsenal produced nothing but ammunition for the defendant.

It is a matter of common knowledge that at the outbreak of the war the productive capacity of the commercial producers of ammunition in the United States was inadequate. The urgent requirements of the army necessitated a rapid

---

and Northwestern Railway Company, transported on Government bill of lading No. N-845519 from Muskegon, Michigan, to Seattle, Washington, and plaintiff there delivered to the consignee, 29,037 pounds of bowling alley outfits loaded in Milw. Car No. 6054, shipped by Inspector of Naval Material consigned to the Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy3570. On or about February 26, 1942, the said equipment was received by the Alaska Steamship Company for transportation on the ship Mt. McKinley to Dutch Harbor, Alaska.

"Contract NOy3570 was entered into pursuant to the provisions of the Acts of April 25, 1939 (53 Stat. 590) and May 25, 1939, (53 Stat. 757, 772) authorizing the construction, development and increase of naval aviation bases in various designated areas, including Alaska. The basic contract covered construction of Naval Air Bases at Kodiak, Alaska, and Sitka, Alaska. The work covered by the basic contract was later augmented by various supplemental agreements and change orders which increased the scope of the contract. Supplemental agreement No. 4 extended it

expansion of government-owned facilities to supplement the existing arsenals. These plants, known as "government-owned and contractor-operated arsenals" were operated under the supervision of the ordnance department. The Twin Cities Ordnance Plant was a public arsenal. Its construction served a military purpose only and the lumber shipped for use in its construction was military property.

In January, 1942, plaintiff transported liquid paving asphalt consigned to the Civil Aeronautics Administrator, Seattle, Washington, and marked "For Export". The asphalt was shipped for use in the construction of the runways of the airport at Cold Bay, Alaska, built with United States' funds on public lands reserved for the use of the Navy Department. History discloses that the Cold Bay airfield, now known as Fort Randall, was a vital defense of key points in Alaska, and when the Japanese invaded the Aleutians, American bombers, based at Cold Bay, Alaska, repulsed the enemy attack aimed at Dutch Harbor. The construction of this air field as a national defense was a military project, and the asphalt was military property.

Plaintiff's counsel have cited, in support of its claims, the case of Leigh R. Powell, et al. vs. United States, decided

---

to cover Dutch Harbor by adding an air base at Unalaska. The actual location of this station was at Dutch Harbor which was situated on Amaknak Island across the channel from the town of Unalaska. At the inception of the work at Dutch Harbor a portion of Amaknak Island was already designated as a Naval reservation. By Executive Order 8786, all of the public lands, subject to existing rights, were reserved for the use of the Navy Department for Naval aviation purposes. Since October, 1941, the entire island has been a military reservation and all non-military personnel and activities have been excluded therefrom.

"Article 22 of the contract provides that 'Only such commissary, recreational, and amusement facilities as may be approved by the Contracting Officer shall be installed or located on the various sites of the work under the contract. No such facilities shall be operated on a profit-making basis.' The alleys were procured on contractor's purchase order, approved by the Resident Officer in charge. They were installed in a semi-permanent wood-construction building at Dutch Harbor. This building was constructed under the authorization of Article 22 of the Contract with the

Dec. 13, 1945, by the United States Circuit Court of Appeals for the Fourth Circuit. The issues in that case are readily distinguishable from those involved in this action. The shipment in the Powell case was phosphates owned by the United States and shipped to the British Ministry of Transport under the Lend-lease Act for use as fertilizer by the farmers of Great Britain. The Court found, in accordance [fol. 18] with the facts, that lend-lease goods were divided into three classes,—(1) military, (2) industrial, and (3) agricultural,—and that the fertilizer was agricultural and not military property. All the shipments in issue in this action were required and used in the defense of the United States and in the furtherance of its war effort, and were shipments of military or naval property of the United States, moving for military or naval use and not for civil use.

After the commencement of this action, plaintiff withdrew its claim against the defendant as set forth in Paragraph IX of the complaint, in the sum of $36.33, and defendant admitted liability on plaintiff's claim described in paragraph IV of the complaint, in the sum of $319.33.

---

approval of the Contracting Officer and the Officer in Charge. The building was originally intended to serve first as a recreation center for the contractor's men and then as a recreational center for military personnel occupying the station, a procedure that was adopted as an economy measure to eliminate the expenditure of additional funds to provide recreational facilities for military personnel. Actually, the structure was completed at about the time (December, 1942) that all civil workmen were evacuated from the station, the construction work was taken over by the Seabees, and the facilities were never used by civilians.

"The construction work performed by civilian employees of the contractor was considered essential by the Navy Department. Due to remoteness, rough weather, difficult working conditions and boredom in off-hours, it was very difficult to keep civilian employees on the job. Despite recruitment under agreement whereby workmen had to pay their own transportation back to the states if they quit before the contract was terminated, the labor turn-over was inordinately high. The average stay of civilian workmen on the job was only 63 days. The recreation hall and theatre were projected and constructed for the purpose of

Plaintiff is entitled to judgment against the defendant on the claim described in paragraph IV of the complaint, in the sum of Three Hundred Nineteen and 33/100 Dollars ($319.33), and its prayer for judgment on all other claims in the complaint is denied.

Dated this 15th day of January, 1946.

Patrick T. Stone, United States District Judge, Western District of Wisconsin.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

Findings of Fact and Conclusions of Law—Filed February 21, 1946

The above entitled cause came on for trial and hearing before this Court, Honorable Patrick T. Stone, Judge, presiding without a jury, upon the 26th day of October, 1945. Mr. L. B. daPonte appeared for plaintiff, and Messrs. Charles H. Cashin, United States District Attorney and

---

expediting completion of the necessary military and naval installations.

"The contractor was a joint venture comprised of Siems-Spokane Co., Johnson Drake and Piper, Inc., and Puget Sound Bridge and Dredging Co., organized for the sole purpose of performing work under contract NOy3570. It performed no work other than that covered by the contract. Control of movement of materials from the island was at all times under the control of the military authorities and construction was entirely under control of the Resident Officer in Charge." • • •

"13. On or about January 26, 1942, plaintiff and its connecting carrier, Southern Pacific Railroad Company, transported on Government bill of lading No. CCA-8918 from Richmond, California, to Seattle, Washington, 1,259 barrels of liquid paving asphalt loaded in eight cars and weighing, with dunnage, 604,365 pounds, shipped by the Standard Oil Company of California consigned to the Civil Aeronautics Administrator, Alaska Project Warehouse, 219 Terry Avenue North, Seattle, Washington, and marked 'For Export,' • • •.

Hubert H. Margolies, Attorney, Department of Justice, appeared for the defendant.

A stipulation of facts was entered into on behalf of the parties and filed with the Court. The matter was fully argued and the cause submitted to this Court for its determination and decision. The Court, being fully advised in [fol. 19] the premises, on the pleadings, the stipulation and the proceedings had herein, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

This action was commenced under the Tucker Act to recover from the defendant freight charges on interstate shipments of Government property by the Northern Pacific Railway Company as the sole, or in some instances, as terminal carrier. Plaintiff submitted its bills to the defendant at published tariff rates. The defendant, claiming that reduced rates on account of land-grant distance under Section 321 (a) of the Transportation Act of 1940 (49 U. S. C.

"The symbol 'DLAND—Supplemental—1942' appearing on the second line of the bill of lading identifies this asphalt as having been purchased and shipped for use in connection with an airport project under a program entitled 'Development of Landing Areas for National Defense' carried on by Civil Aeronautics Administration. The symbol '9-206', also appearing on the second line of the bill of lading identifies this particular shipment as being for use in connection with the airport project at Cold Bay, Alaska. The paving asphalt was used for the construction of the airport at Cold Bay, Alaska, in place of concrete, which is unsuitable to the terrain. Unlike most DLAND projects which are built on land owned by states, counties, cities and other political subdivision, the airport at Cold Bay was built without sponsor on public lands owned by the United States and reserved for the use of the Navy Department by Executive Order No. 5214, dated October 30, 1929.

"Funds for the construction of the airport were derived from appropriations made for 'Development of Landing Areas for "National Defense" ' under various appropriation acts passed by the 76th and 77th Congress. These appropriations were for 'the construction, improvement

Section 65 (a)) were applicable, deducted the differences between the published tariff rates and the reduced rates on account of land-grant distance, in some instances from the original bills and in other instances from subsequent bills.

II

Plaintiff has satisfied the requirements for maintaining a suit against the United States under the Tucker Act, Act of March 3, 1887, as amended, U. S. C. Title 28, Sections 41 (20) and 761-5.

III

Northern Pacific Railroad Company was incorporated by the Act of July 2, 1864 (13 St. L. 365), supplemented by Joint Resolution of May 31, 1870 (16 St. L. 378), with power to construct a railroad and telegraph line from a point on Lake Superior in Wisconsin to Puget Sound, and from Portland, Oregon, to Puget Sound. By Sec. 2 of said Act the right of way over public lands was granted, and by Sec. 3 the Company received a grant of lands in aid of construction "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to

---

and repair of public airports and public landing areas in the United States and its territories and possessions, determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense. . .' The determination for an airport at Cold Bay, Alaska, was made by the administrator and duly approved by the Board. Installations at landing areas were built at the request of or in consultation with the War or Navy Department, and in accordance with the desires of the Alaska Defense Command. In the winter of 1941-42, the Alaska Defense Command considered Cold Bay the most important field in Alaska and urged its completion at the earliest possible moment. On December 15, 1941, Major General S. B. Buckner, Jr., from the Headquarters Alaska Defense Command, Fort Richardson, Alaska, advised the Civil Aeronautics Administration that the field at Cold Bay was 'vital to the immediate defense of key points in Alaska' and in a letter of that day listing the order of priority for the preparation of airfields in Alaska he placed the Cold Bay project first in importance.

secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway . . . ." In 1896 said railroad passed [fol. 20] to the Northern Pacific Railway Company, plaintiff herein, which succeeded to all of the rights and obligations of said Northern Pacific Railroad Company.

IV

Sec. 11 of said Act of July 2, 1864, provides that the Northern Pacific Railroad Company, or any part thereof shall be a post route and a military road subject to the use of the United States for postal, military or naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation. Sec. 20 of the Act, "to secure to the government at all times (but particularly in time of war)" the use and benefits of the railroad for postal, military, and other purposes, reserves to Congress the right to add to, alter, amend or repeal the Act, having due regard for the rights of the railroad.

"Stripping and grading operations were commenced in August, 1941. At this time the situation in the Pacific was critical. After one of the runways had been graded, the War Department began the second runway with troop labor. Soon after, and prior to the completion of the contract, and on or about May 30, 1942, the contractor was ordered to vacate the site and the project was taken over by the Army. The War Department took over all the asphalt, expanded the runway length from 5,000 to 7,500 feet, and finished the job. The War Department has since been in complete control of the field, which is now known as Fort Randall. The Army has operated and maintained the landing area and the radio facility constructed by CAA at the same time.

"At the time of the invasion of the Aleutians by the Japanese, the field at Cold Bay played an important part in the defense of Alaska. The unexpected appearance of bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor shortly after the contractors were ordered to vacate the site. The Cold Bay project had been kept secret because of the military situation."

V

By the Army Appropriation Act of June 7, 1924, 43 Stat. 486, 10 U. S. C. A. § 1375, it was provided as follows:

> "Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States * * * over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service."

VI

Rates for government transportation over land grant routes continued to be fifty per cent of published rates until the Transportation Act of 1940 was enacted. That Act relinquished the Government's right to reduced rates for [fol. 21] transportation of its property, except military or naval property moving for military or naval and not for civil use, upon condition that railroads having received a land-grant should file releases of any claims they had against the United States to additional lands, or compensation for lands to which they might be entitled under the grants.

VII

Prior to performance of the transportation services in question, plaintiff and other carriers concerned duly filed the required releases, and they were approved by the Secretary of the Interior. The full applicable commercial rates, fares and charges are payable by the United States for transportation by any common carrier subject to the Interstate Commerce Act, of any property for the United States or on its behalf, except "military or naval property of the United States moving for military or naval and not for civil use," and except where special rates applicable to the shipments by the United States may be in effect.

VIII

Upon filing and approval of releases, including the release of the Northern Pacific Railway Company, which was approved by the Secretary on April 16, 1941, the Secretary of the Interior issued and published the statement attached to the stipulation and marked Exhibit "A." The lawsuit referred to on page 2 of the Secretary's statement was filed pursuant to the Act of June 25, 1929 (46 St. L. 41), which expropriated to the United States all lands within the limits of forest reserves to which the Railway Company might be found to be entitled in said suit, upon payment to the Railway Company by the United States of just compensation therefor. Suit was brought pursuant to this Act. A final decree was rendered, which was affirmed in part and remanded in part by the decision of the Supreme Court in *United States v. Northern Pacific Railway Company*, 311 U. S. 317. By the decision of the Supreme Court it was finally adjudged that the Northern Pacific Railway Company was entitled to patents to 428,986.68 acres, carried in the Railway Company's inventory at a value of approximately $1,400,000, which the Northern Pacific Railway [fol. 22] Company released pursuant to the Transportation Act of 1940. In addition thereto, the Northern Pacific Railway Company released claims which it asserted against the United States in said suit for compensation for expropriated lands, amounting to a total of 1,453,061.02 acres which it claimed in said suit to be of the fair value of $14,468,649.06. Upon filing of said release by the Northern Pacific Railway Company, said suit was dismissed.

IX

In open court counsel for defendant withdrew its defense to the claim asserted in paragraph IV of the complaint and admitted liability to plaintiff at the published rates on the shipments of coal under War Department contract to Fort Missoula, Montana, in June 1941 for its maintenance. At the time the Fort was not occupied or used by the Army for military forces or by military personnel but was in use by the Immigration and Naturalization Service of the Department of Justice, under a revocable permit from the War Department, for the detention and safekeeping of alien sailors, Italians and Germans, who had entered the United States without having complied with the immigration laws or were

in the United States following removal from ships scuttled in American ports. Some of the seamen were taken into custody because of acts of sabotage to their own ships; others were delivered to the custody of the Immigration and Naturalization Service from the Canal Zone. The seamen were detained pending the time when they could be deported to the country whence they came. They were detained at Fort Missoula in June, 1941, when the shipments were made and received, and for many months thereafter.

X

During the month of August, 1941, plaintiff, in connection with the New York, New Haven and Hartford Railroad Company, the Erie Railroad Company, and Chicago and North Western Railway Company, transported on Government bill of lading N686622 from Pawtucket, Rhode Island, to Tacoma, Washington, in connection with contract NOs-88648, and plaintiff there delivered to the consignee 15,780 pounds of insulated copper cable shipped by the inspector [fol. 23] of naval material, United States Navy, Boston, Massachusetts, consigned to District Material Officer, Thirteenth Naval District, c/o Seattle-Tacoma Shipbuilding Company for Maritime Commission, Hull 123.

The insulated copper cable was furnished and transported by the Navy Department of the United States for the purpose of being used in the installation of degaussing equipment (to neutralize magnetic mines) on Hull No. 123. Hull No. 123 was a single screw cargo vessel built by the Seattle-Tacoma Shipbuilding Corporation pursuant to a contract entered into on October 9, 1939, between the Seattle-Tacoma Shipbuilding Corporation and the Maritime Commission of America.

In accordance with the provisions of subsection (b) of Sec. 501 of the Merchant Marine Act of 1936, as amended (46 U.S.C., Sec. 1151 (b)) the plans and specifications for the construction of Hull No. 123 were submitted to the Navy Department for suggestions as to changes that should be made, in order that the vessel might be suitable for conversion into a military or naval auxiliary or suitable to the United States in time of war.

In 1940, while this vessel was under construction, it was determined by the Navy Department and the Maritime Commission that all vessels under construction by the Maritime

Commission should have degaussing equipment. Discussions between the Navy Department and the Maritime Commission resulted in the adoption of the following procedure for equipping Maritime Commission vessels under construction:

> Degaussing specifications would be prepared by the Navy Department and transmitted to the Maritime Commission for forwarding to the Commission's ship contractor. Responsibility was placed on the Maritime Commission to make all necessary arrangements with the shipbuilders in accordance with the specifications furnished by the Navy Department. All degaussing equipment was to be furnished by the Navy Department, including additional generating capacity where necessary. The cost of the equipment together with the cost of transportation was to be borne by the Navy Department. During the installation of the equipment the Navy Department would act in an advisory capacity, providing technical information whenever necessary.

[fol. 24] Specifications for the degaussing equipment for Hull No. 123, later known as the S. S. Idaho, were furnished by the United States Navy Department, which acted in an advisory capacity in the installation, and assumed and paid for the cost of the degaussing equipment and all transportation costs.

Article 9 of the Maritime Commission contract covering the sale of the vessel reads in part as follows:

> "Until the emergency declared by the President of the United States in a proclamation dated September 8, 1939, shall cease to exist, the vessel shall be operated to and from such port or ports and under such conditions as the Commission shall direct."

Since the date of its delivery on September 8, 1941, the vessel has been operated as directed by the Maritime Commission, or War Shipping Administration.

The lawfully published tariff rate in effect at the time and applicable to the transportation of copper wire, was $3.43 per 100 pounds, and the applicable commercial charge for the transportation of a like commercial shipment would be the sum of $549.14. Plaintiff duly rendered its bill No. FK-10224 in the sum of $549.14 to the Bureau of Supplies

and Accounts of the United States Navy and in November, 1941, the amount of said bill was paid in full to the plaintiff. Thereafter, and on or about July 8, 1942, the General Accounting Office of the United States notified plaintiff that credit for $204.59 paid to plaintiff on said bill No. FK-10224 would be withheld or a charge raised in plaintiff's next statement of settlement, on account of land-grant deductions on said shipment, unless a satisfactory explanation were promptly made or the amount deposited. Plaintiff thereupon refused to deposit said amount and on or about February 22, 1943, the Navy Department, over plaintiff's written protest, deducted the said sum of $204.59 from the amount found to be due plaintiff on its bill No. FR-408 rendered in February, 1943, for other transportation services performed by plaintiff for defendant.

XL

During the months of January and February, 1942, plaintiff transported over its own line, on commercial bills of [fol. 25] lading from Longview, Whites, Everett and Shelton, Washington, to New Brighton, Minnesota, and there delivered to the consignee, seven carloads of lumber, shipped by various lumber companies, consigned to the U. S. Area Engineer, Twin Cities Ordnance Plant in care of Foley Brothers, Inc., and Walbridge, Aldinger Company, as follows:

Car No.	From	Date Shipped	Date Delivered	Weight
90276 PMCKY	Longview	2/ 3/42	2/12/42	80,660 lbs.
60989 NP	Longview	2/ 3/42	2/13/42	83,880 "
43202 PMLE	Longview	2/ 5/42	2/15/42	73,040 "
93083 PM	Whites	2/ 5/42	2/14/42	65,320 "
72272 WLE	Everett	2/ 6/42	2/16/42	68,080 "
13844 NP	Shelton	1/28/42	2/ 9/42	83,660 "
17392 NP	Shelton	2/ 2/42	2/14/42	87,780 "

Twin Cities Ordnance Plant at New Brighton, Minnesota, was constructed for the United States, under authority of the Secretary of War, for the manufacture of .30 and .50 caliber ammunition pursuant to a cost-plus-fixed-fee construction and operation contract, Contract No. W-ord-527, entered into in July, 1941, with the Federal Cartridge Corporation of Minneapolis, Minnesota. The plant was con-

structed on a site furnished and made available by the Government, which is, and at all times has been, the owner of the plant facility known as Twin Cities Ordnance Plant. Foley Bros. and Walbridge, Aldinger Company, as a joint venture, were the authorized and approved subcontractors for the construction services. The plants were to have an average daily capacity based on twenty-four (24) hours of operation per day, of 2,000,000 rounds of caliber .30 ammunition and 600,000 rounds of caliber .50 ammunition. By supplemental contract in January, 1942, the plant was expanded to provide a capacity of 5,000,000 rounds of caliber .30 and 1,600,000 rounds of caliber .50.

Construction of the plant project was under the supervision of the Quartermaster Corps, United States Army, from July 17, 1941, to December 15, 1941. Thereafter, all construction work at the Project was under the supervision of the Corps of Engineers, United States Army. The plant was constructed in three parts, known as Plant 1, Plant 2, [fol. 26] and Plant 2 Expansion. The buildings of Plant 1 were constructed largely of steel, brick and concrete and were substantially complete on or about June 30, 1942. Plant No. 2 and Plant No. 2 Expansion were started January 7, 1942, and completed on or about January 15, 1943. They consisted of several large manufacturing buildings with the necessary additional buildings, all of wood construction.

The Purchase Orders for lumber for the construction of Plant No. 2 and Plant 2 Expansion were issued against Purchase Allocations issued by the Office, Chief of Engineers, Washington, D. C. As contractors for the project Foley Bros., Inc., and Walbridge, Aldinger issued requisitions for purchase of the amounts of lumber they estimated would be required. On receipt of such requisitions the Area Engineer advised the Office, Chief of Engineers, as to such requirements. That Office issued allocations therefor, and on receipt of such allocations, the contractor issued Purchase Orders to Vendors.

All of the lumber shipments in question were used in the construction of Plant 2 and Plant 2 Expansion. Title to all work completed or in the course of construction, and title to all materials, vested in the Government when designated by its Contracting Officer, and the Government reserved the right to furnish any materials necessary for the completion of the work. The Office, Chief of Engineers, acted as a

central procuring agency for lumber used in the construction of the ordnance plant and issued allocations for the purchase of said lumber. Since January, 1943, the ordnance plant has been engaged in the manufacture of .30 and .50 caliber ammunition for use by the armed forces of the United States in the present emergency.

The lawfully published tariff rate on lumber from the origin point of each of said shipments to New Brighton, Minnesota, in effect at the time and applicable to each of said shipments, was 65.5 cents per one hundred pounds, and the full commercial charges for the transportation of like commercial shipments would amount to the sum of $3,552.84.

Each of the commercial bills of lading covering said shipments contained a notation that it was to be converted into Government bill of lading at destination, and upon delivery of said shipments Government bills of lading Nos. WQ 4668888, WQ4668907, WQ4668913, WQ4668908, WQ4668923, WQ4668924, and WQ4668925, respectively, duly accomp- [fol. 27] lished, were surrendered to plaintiff in exchange for said commercial bills of lading and in lieu of payment of freight charges. Thereafter, plaintiff rendered its bill No. FN-2593 for the sum of $3,552.84 for the transportation of said shipments to the Finance Office, United States Army, and in April, 1942, the amount of said bill was paid in full to plaintiff. Thereafter, and on or about May 26, 1943, the Claims Division of the General Accounting Office of the United States notified plaintiff that in the audit of said bill of overpayment amounting to the sum of $1,727.11, account land-grant deductions, had been noted, and that pursuant to Sec. 322 of the Transportation Act of 1940, 54 Stat. 955, a deduction of said amount would be made from an amount otherwise due plaintiff unless said alleged overpayment were refunded within sixty days. Plaintiff refused to refund said amount, or any portion thereof, and thereafter, in November, 1943, the Finance Office, United States Army, acting upon instructions from said General Accounting Office, over plaintiff's written protest, deducted said sum of $1,727.11 from the amount found to be due plaintiff on its bill No. FR-43438 rendered in October, 1943, for other transportation services performed by plaintiff for defendant.

Such of the transportation charges as were proper were commitments under appropriations made by Congress for Military Activities, for Expediting Production of Equipment and Supplies for National Defense, 1940-43, see Title

III, Military Appropriation Act 1942 (Third Supplemental National Defense Appropriation Act, 1942) 55 Stat. 810; Title IV, Military Appropriation Act, 1942 (Fourth Supplemental National Defense Appropriation Act, 1942), 56 Stat. 38; and Title V, Military Appropriation Act, 1942, (Fifth Supplemental National Defense Appropriation Act, 1942) 56 Stat. 128.

XII

On or about May 10, 1943, plaintiff transported over its own line of railroad on Government bill of lading No. M-121708-43 from Bucoda, Washington, to Minneapolis, Minnesota, and there delivered to the consignee, 113,120 pounds of fir lumber loaded in car No. PLE 46525, shipped by Mutual Lumber Company, consigned to Depot Quartermaster, Aaron Carlson care Crown Iron Works, at Minneapolis, Minnesota, for United States Marine Corps.

[fol. 28] The lumber was shipped to be urea salts treated, kiln dried, milled and manufactured into trestle balks and ponton balks, sills, and chess, at the Crown Iron Works at Minneapolis. The balks, sills and chess are necessary members of a certain type of ponton or demountable floating bridge required to move military personnel and vehicles of war across water barriers: The trestle and ponton balks manufactured from the lumber shipped in Car No. PLE 46525 are now overseas in connection with military and naval operations or have been used in construction of ponton bridges and temporary piers used at Camp Lejeune, North Carolina, and Quantico, Virginia, for training of combat engineers.

The lawfully published tariff rate on fir lumber from Bucoda, Washington, to Minneapolis, Minnesota, in effect at the time was 69 cents per one hundred pounds, and the full commercial freight charges for the transportation of a like commercial shipment would amount to $780.53. Plaintiff presented its bill No. F-R-20168 to the Quartermaster Department, United States Marine Corps, for the sum of $780.53 on account of the transportation of said shipment, but said department deducted the sum of $388.04 from said bill on account of land-grant distance and paid to plaintiff only the sum of $392.49. Plaintiff accepted said sum under protest and as part payment only and notified the Quartermaster General, United States Marine Corps, that it reserved the right to sue for the unpaid balance of said bill.

XIII

On or about February 13, 1942, plaintiff and its connecting carriers, the Grand Trunk Railroad and the Chicago & North Western Railway Company, transported on Government bill of lading No. N-845519 from Muskegon, Michigan, to Seattle, Washington, and plaintiff there delivered to the consignee, 29,087 pounds of bowling alley outfits loaded in Milw. Car No. 6054, shipped by Inspector of Naval Material consigned to the Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy3570. On or about February 26, 1942, the said equipment was received by the Alaska Steamship Company for transportation on the ship Mt. McKinley to Dutch Harbor, Alaska.

[fol. 29] Contract NOy3570 was entered into pursuant to the provisions of the Acts of April 25, 1939 (53 Stat. 590) and May 25, 1939 (53 Stat. 757, 772) authorizing the construction, development and increase of naval aviation bases in various designated areas, including Alaska. The basic contract covered construction of Naval Air Bases at Kodiak, Alaska, and Sitka, Alaska. The work covered by the basic contract was later augmented by various supplemental agreements and change orders which increased the scope of the contract. (A copy of the contract with supplements was introduced at the Hearing herein.) Supplemental Agreement No. 4 extended it to cover Dutch Harbor by adding an Air Base at Unalaska. The actual location of this station was at Dutch Harbor which was situated on Amaknak Island across the channel from the town of Unalaska. At the inception of the work at Dutch Harbor, a portion of Amaknak Island was already designated as a Naval reservation. By Executive Order 8786, all of the public lands, subject to existing rights, were reserved for the use of the Navy Department for Naval aviation purposes. Since October, 1941, the entire island has been a military reservation and all nonmilitary personnel and activities have been excluded therefrom.

Article 22 of the contract provides that "only such commissary, recreational, and amusement facilities as may be approved by the Contracting Officer shall be installed or located on the various sites of the work under the contract. No such facilities shall be operated on a profit-making

basis." The alleys were procured on contractor's purchase order, approved by the Resident Officer in charge. They were installed in a semi-permanent wood construction building at Dutch Harbor. This building was constructed under the authorization of Article 22 of the contract with the approval of the Contracting Officer and the Officer in Charge. The building was originally intended to serve first as a recreation center for the contractor's men and then as a recreational center for military personnel occupying the station, a procedure that was adopted as an economy measure to eliminate the expenditure of additional funds to provide recreational facilities for military personnel. Actually, the structure was completed at about the time (December,1942) that all civil workmen were evacuated from the station, the construction work was taken over by the Seabees, and the facilities were never used by civilians. [fol. 30] The construction work performed by civilian employees of the contractor was considered essential by the Navy Department. Due to remoteness, rough weather, difficult working conditions and boredom in off-hours it was very difficult to keep civilian employees on the job. Despite recruitment under agreement whereby workmen had to pay their own transportation back to the states if they quit before the contract was terminated, the labor turn-over was inordinately high. The average stay of civilian workmen on the job was only 63 days. The recreation hall and theatre were projected and constructed for the purpose of expediting completion of the necessary military and naval installations.

The contractor was a joint venture comprised of Siems-Spokane Co., Johnson Drake and Piper, Inc., and Puget Sound Bridge and Dredging Co., organized for the sole purpose of performing work under contract NOy3570. It performed no work other than that covered by the contract.

Control of movement of materials from the island was at all times under control of the military authorities and construction was entirely under control of the Resident Officer in Charge.

The lawfully published tariff rate in effect at the time and applicable to a shipment of such equipment was $2.48 per one hundred pounds, and the full applicable commercial

freight charges for the transportation of like commercial shipments would amount to the sum of $720.11. Plaintiff duly rendered its bill No. FN-3734 for the transportation of said shipment, in the amount of $792.71, based on an erroneous rate of $2.73 per one hundred pounds, to the Bureau of Supplies and Accounts of the Navy Department of the United States. The amount thereof was paid in full to plaintiff on or about April 9, 1942. On or about April 27, 1943, the Claims Division of the General Accounting Office of the United States notified plaintiff that in the audit of said bill No. FN-3734 an overpayment in the amount of $394.15, account a change in the gross commercial rate and land-grant deductions, had been noted, and that pursuant to Sec. 322 of the Transportation Act of 1940, a deduction of said amount would be made from an amount otherwise due plaintiff, unless said alleged overpayment were refunded within sixty days. Plaintiff refused to refund said amount or any part thereof and thereafter, during the month of November, 1943, the Disbursing Officer of the Bureau of Sup- [fol. 31] plies and Accounts of the Navy Department, acting upon instructions from said General Accounting Office of the United States, deducted the sum of $394.15 from the amount found to be due plaintiff on its bill No. FR-39047 for other transportation services performed by plaintiff for said bureau of Supplies and Accounts.

XIV

Prior to the argument herein plaintiff dismissed, with prejudice, its claim for additional freight charges on the shipment described in paragraph IX of its complaint and paragraph 12 of the Stipulation, consisting of Kohler fittings for use in Navy Barracks No. 2 at the Dutch Harbor Station by personnel of the Navy Department.

XV

On or about January 26, 1942, plaintiff and its connecting carrier, Southern Pacific Railroad Company, transported on Goverment bill of lading No. CCA-8918 from Richmond, California, to Seattle, Washington, 1,259 barrels of liquid paving asphalt loaded in eight cars and weighing, with dunnage, 604,365 pounds, shipped by the Standard Oil Company of California consigned to the Civil Aeronautics Administrator, Alaska Project Warehouse, 219 Terry

Avenue North, Seattle, Washington, and marked "For Export," as follows:

Car No.		Lading	Weight
S. P.	84421	162 bbls.	77,803 lbs.
S. P.	32533	152 "	73,106 "
L. V.	60264	152 "	72,932 "
S. P.	63703	161 "	77,201 "
S. P.	29926	164 "	78,727 "
C. B. & Q.	16386	152 "	73,038 "
S. P.	36177	152 "	72,818 "
P. M.	90546	164 "	78,740 "
		1,259 "	604,365 "

The symbol "DLAND—Supplemental—1942" appearing on the second line of the bill of lading identifies this asphalt as having been purchased and shipped for use in [fol. 32] connection with an airport project under a program entitled "Development of Landing Areas for National Defense" carried on by Civil Aeronautics Administration. The symbol "9-206," also appearing on the second line of the bill of lading identifies this particular shipment as being for use in connection with the airport project at Cold Bay, Alaska. The paving asphalt was used for the construction of the airport at Cold Bay, Alaska, in place of concrete, which is unsuitable to the terrain. Unlike most DLAND projects which are built on land owned by states, counties, cities and other political subdivisions, the airport at Cold Bay was built without sponsor on public lands owned by the United States and reserved for the use of the Navy Department by Executive Order No. 5214, dated October 30, 1929.

Funds for the construction of the airport were derived from appropriations made for "Development of Landing Areas for 'National Defense'" under various appropriation acts passed by the 76th and 77th Congress. These appropriations were for "the construction, improvement and repair of public airports and public landing areas in the United States and its territories and possessions, determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense . . ." The determination for an air-

port at Cold Bay, Alaska, was made by the administrator and duly approved by the Board. Installations at landing areas were built at the request of or in consultation with the War or Navy Department, and in accordance with the desires of the Alaska Defense Command. In the winter of 1941-1942, the Alaska Defense Command considered Cold Bay the most important field in Alaska and urged its completion at the earliest possible moment. On December 15, 1941, Major General S. B. Buckner, Jr., from the Headquarters Alaska Defense Command, Fort Richardson, Alaska, advised the Civil Aeronautics Administration that the field at Cold Bay was "vital to the immediate defense of key points in Alaska" and in a letter of that day listing the order of priority for the preparation of airfields in Alaska he placed the Cold Bay project first in importance.

Stripping and grading operations were commenced in August, 1941. At this time the situation in the Pacific was critical. After one of the runways had been graded, the [fol. 33] War Department began the second runway with troop labor. Soon after, and prior to the completion of the contract, and on or about May 30, 1942, the contractor was ordered to vacate the site and the project was taken over by the Army. The War Department took over all the asphalt, expanded the runway length from 5,000 to 7,500 feet, and finished the job. The War Department has since been in complete control of the field, which is now known as Fort Randall. The Army has operated and maintained the landing area and the radio facility constructed by CAA at the same time.

At the time of the invasion of the Aleutians by the Japanese, the field at Cold Bay played an important part in the defense of Alaska. The unexpected appearance of bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor shortly after the contractors were ordered to vacate the site. The Cold Bay project had been kept secret because of the military situation.

The lawfully published tariff rate in effect and applicable to liquid asphalt was 32 cents per one hundred pounds. Freight charges for the transportation of a like commercial shipment would amount to $1,933.97. Plaintiff duly rendered its bill No. F-N-4746 to the Civil Aeronautics Administration, Department of Commerce, Washington, D. C., in the sum of $1,953.81, comprised of freight charges of

$1,933.97 computed at commercial rates, and alleged reconsigning charges in the amount of $19.84. In May, 1942, the bill was paid in full to plaintiff. On or about May 15, 1943, the Claims Division of the General Accounting Office of the United States notified plaintiff that in the audit of plaintiff's bill No. [redacted]-N-4746, an overpayment in the amount of $855.86, consisting of $836.02 deduction account land-grant and $19.84 reconsigning charges, had been noted, and that deduction of said amount would be made from an amount otherwise due plaintiff unless said alleged overpayment were refunded within sixty days. Plaintiff refused to refund said amount or any part thereof and thereafter during the month of March, 1944, Civil Aeronautics Administration, acting upon instructions from said General Accounting Office of the United States, over plaintiff's protest, deducted said sum of $855.86 from the amount found to be due plaintiff on its bill No. F-R-51806, dated March 11, 1944, for the transportation services performed by plaintiff and connecting carriers for Civil Aeronautics Administration.

[fol. 34] And from the foregoing findings, the Court, in the above entitled cause, now makes and enters the following

Conclusions of Law

I

The Court has jurisdiction of this action under the Tucker Act (paragraph 20 of Sec. 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093, as amended, 28 U. S. C. A., Sec. 41 (20)) and of the parties.

II

That portion of Section 321 (a) of the Transportation Act of 1940 pertinent to these proceedings reads:

> "Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to (the Act) * * * of any * * * property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

III

Each of the shipments described in the foregoing Findings, except the shipment of coal to Missoula, described in paragraph IX, was "military or naval property moving for military or naval and not for civil use," and entitled to land grant rates under Section 321 (a) of the Transportation Act of 1940.

IV

Plaintiff is entitled to judgment against defendant in the sum of $319.33 on the claim described in paragraph IX of the foregoing Findings of Fact.

[fol. 35]

V

Plaintiff is not entitled to recover on the other claims which are described in the foregoing Findings, and the same should be dismissed with prejudice.

Let judgment be entered accordingly.

Dated this 21st day of February, 1946.

Patrick T. Stone, United States District Judge, Western District of Wisconsin.

[File endorsement omitted.]

In the District Court of the United States

Judgment—Filed February 21, 1946

The above entitled cause having been tried before the Court, Honorable Patrick T. Stone presiding, without a jury, upon the 26th day of October, 1945, and the Court having made and filed its Memorandum Opinion dated January 15, 1946, and its Findings of Fact and Conclusions of Law and Order for Judgment dated the 21st day of February, 1946,

Now, Therefore, It Is Ordered, Adjudged and Decreed, that plaintiff, Northern Pacific Railway Company, do have and recover from defendant, the United States of America, the sum of Three Hundred Nineteen and 33/100 Dollars ($319.33) upon the claim described in paragraph IV of its complaint herein, and that the remaining claims described

in said complaint be and they are hereby dismissed with prejudice.

Dated this 21st day of February, 1946.

H. C. Hale, Clerk, U. S. District Court, Western District of Wisconsin.

[File endorsement omitted.]

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL—Filed February 26, 1946

To Whom It May Concern:

Notice is hereby given that Northern Pacific Railway Company, plaintiff, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from that portion of the judgment entered herein on the 1st day of February, 1946, which dismisses with prejudice the claims and demands described in plaintiff's complaint other than the claim described in paragraph IV of its complaint, on which judgment is awarded plaintiff for the sum of $319.33.

Dated this 25th day of February, 1946.

L. B. da Ponte, M. L. Countryman, Jr., Attorneys for Plaintiff, 1018 Northern Pacific Railway Bldg., St. Paul 1, Minnesota.

[File endorsement omitted.]

[fol. 37] IN THE DISTRICT COURT OF THE UNITED STATES

STATEMENT OF POINTS—Filed February 26, 1946

Plaintiff, Northern Pacific Railway Company, hereby submits the following Statement of Points of error asserted and intended to be urged on the appeal of this cause:

I

The Court erred in construing the phrase "military or naval property of the United States moving for military

or naval and not for civil use" in Section 321, Transportation Act of 1940, as including raw or unfinished materials or ingredients moving for use in manufacture of munitions or construction of fortifications, munition plants, naval bases, air fields, cargo vessels, and other facilities required for prosecuting the war.

II

The Court erred in its Conclusion of Law and Judgment that plaintiff is not entitled to recover on the claims which are described in the complaint and Findings of Fact (other than the claim described in paragraphs IV and IX of the complaint), and in dismissing this action with prejudice as to all such claims.

III

The Court erred in deciding that the shipment of insulated copper cable for installation in the hold of a cargo vessel, described in paragraph X of the Findings of Fact, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act of 1940.

IV

The Court erred in deciding that the shipments of lumber for construction of Twin Cities Ordnance Plant, described in paragraph XI of the Findings of Fact, was military or [fol. 38] naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act of 1940.

V

The Court erred in deciding that the shipment of lumber described in paragraph XII of the Findings of Fact, to be milled and manufactured into trestle balks and pontoon balks at the Crown Iron Works, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act, 1940.

VI

The Court erred in deciding that the shipment of bowling alley outfits described in paragraph XIII of the Findings of Fact, for recreation of employees of the contractor con-

structing a naval base at Dutch Harbor, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act of 1940.

VII

The Court erred in deciding that the shipments of liquid paving asphalt described in paragraph XV of the Findings of Fact, for use in constructing runways for the public airport at Cold Bay, Alaska, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act, 1940.

L. B. da Ponte, M. L. Countryman, Jr., Attorneys for Plaintiff, Northern Pacific Railway Company, 1018 Northern Pacific Ry. Bldg., St. Paul 1, Minnesota.

[File endorsement omitted.]

[fols. 39-40] Cost Bond on Appeal for $250.00 filed Feb. 26, 1946, omitted in printing.

[fol. 41] In the District Court of the United States

Stipulation for Inclusion of Additional Material for Supplemental Record on Appeal—March 12, 1946

It Is Stipulated between counsel for the respective parties that the record on appeal may be supplemented and certified by the Clerk to include:

1. The originals of Defendant's Exhibits 1 and 2.
2. Page 3 Reporter's Transcript of Proceedings.
3. That part of Reporter's Transcript of Proceedings beginning with the words "Now, the next item is plumbing fixtures." at page 10 and ending with the phrase "all the questions we are concerned with.", at page 11.

That portion of the Reporter's Transcript of Proceedings beginning with the words "Now, because of the importance of this cost-plus shipment, if there is any question being raised as to the passage of title to the United States" at page 74, and ending with the phrase "to the Twin Cities

Ordnance Plant was in the United States." at page 75; and beginning with the words "Now, coming back to the question of whether the United States had title to the lumber" at page 79, and ending with page 86 inclusive.

Charles H. Cashin, Attorney for Defendant; L. B. da Ponte, M. L. Countryman, Attorneys for Plaintiff.

Dated: March 12, 1946.

[fol. 42] IN THE DISTRICT COURT OF THE UNITED STATES

DESIGNATION OF RECORD ON APPEAL—Filed February 28, 1946

Pursuant to Rule 75, Rules of Civil Procedure, plaintiff, Northern Pacific Railway Company, hereby designates the following portions of the Record and proceedings herein to be contained in the Record on Appeal:

(1) Complaint.
(2) Answer.
(3) Stipulation of Facts.
(4) Memorandum Opinion of Judge Stone.
(5) Findings of Fact, Conclusions of Law, and Order for Judgment.
(6) Judgment.
(7) Notice of Appeal.
(8) Appeal Bond.
(9) Statement of Points.
(10) Designation of Record.

L. B. da Ponte, M. L. Countryman, Jr., Attorneys for Plaintiff, Northern Pacific Railway Company, 1018 Northern Pacific Railway Bldg., St. Paul 1, Minnesota.

Due service of this instrument and receipt of copy thereof admitted this 27th day of February, 1946.

Charles H. Cashin, Attorney for Defendant.

[File endorsement omitted.]

[fols. 43-44] Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 45-46] IN THE DISTRICT COURT OF THE UNITED STATES

STIPULATION FOR PRINTING OF RECORD—March 12, 1946

It is stipulated between counsel for the respective parties that the following papers only need be printed as the record on appeal for the hearing in this cause:

1. Findings of Fact, Conclusions of Law, and Order for Judgment.
2. Memorandum Opinion Below.
3. Judgment.
4. Notice of Appeal.
5. Appeal Bond.
6. Statement of Points.
7. Designation of Record on Appeal.
8. Stipulation for inclusion of additional material for supplemental record on appeal.
9. Page 3 Reporter's Transcript of Proceedings.
10. That part of Reporter's Transcript of Proceedings beginning with the words "Now, the next item is plumbing fixtures." at page 10 and ending with the phrase "all the questions we are concerned with.", at page 11.
11. That portion of the Reporter's Transcript of Proceedings begining with the words "Now, because of the importance of this cost-plus shipment, if there is any question being raised as to the passage of title to the United States" at page 74, and ending with the phrase "to the Twin Cities Ordnance Plant was in the United States." at page 75; and beginning with the words "Now, coming back to the question of whether the United States had title to the lumber" at page 79, and ending with page 86 inclusive.
12. This stipulation.

J. B. da Ponte, M. L. Countryman, Attorneys for Plaintiff and Appellant. Charles H. Cashin, Attorney for Defendant and Appellee.

Dated: March 12, 1946. Approved 3-15-46: William M. Sparks, J.

[fols. 47-48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Title omitted]

APPEARANCES FOR APPELLANT—Filed March 12, 1946

The Clerk will enter our appearance as counsel for appellant.

L. B. da Ponte, M. L. Countryman, 5th and Jackson Sts., St. Paul, Minn.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

APPEARANCES FOR APPELLEE—Filed March 13, 1946

The Court will enter our appearance as counsel for appellee.

John F. Sonnett, Washington, D. C., Asst. Atty. Gen. Hubert H. Margolies, Washington, D. C., Atty. Dept. of Justice. Charles H. Cashin, Madison, Wisconsin, United States Attorney.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—June 5, 1946

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by L. B. Da Ponte, counsel for appellant, and by Mr. Hubert Margolies, counsel for appellee, and the Court takes this matter under advisement.

[fol. 52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for the Western District of Wisconsin

OPINION—Filed July 8, 1946

Before Sparks, Kerner, and Minton, Circuit Judges.

Minton, Circuit Judge. This suit was brought under the Tucker Act[1] to recover the difference between freight charges billed by the plaintiff at the full tariff rates and the amounts paid by the defendant at land grant rates for transportation of shipments of Government property. The parties entered into a stipulation of the facts which was adopted by the District Court as its findings of fact.

Judgment from which this appeal is taken was entered dismissing plaintiff's claim to recover freight charges on five shipments. The error relied upon is the District Court's conclusion of law that each of the five shipments was "military or naval property moving for military or naval; and not for civil use," and entitled to land grant rates under Section 321(a) Transportation Act, 1940.

The facts as to the five shipments in controversy are as follows:

[fol. 53] (1) *Copper cable.* In August, 1941, plaintiff and connecting carriers transported from Pawtucket, Rhode Island to Tacoma, Washington, and delivered to consignee, 15,780 pounds of insulated copper cable shipped by Inspector of Naval Material, United States Navy, Boston Massachusetts, consigned to District Material Officer, 13th Naval District, % Seattle-Tacoma Shipbuilding Corporation, for Maritime Commission, Hull 123. The cable was furnished by the Navy Department for use in insulation of degaussing equipment (to neutralize magnetic mines) on Hull 123. Hull 123 was a single screw cargo vessel being built

[1] 28 U. S. C. A. Sec. 41 (20).

by the Seattle-Tacoma Shipbuilding Corporation under contract dated October, 1939, between said shipbuilding corporation and the Maritime Commission. In 1940, while the vessel was under construction, it was decided by the Navy Department and the Maritime Commission that all vessels under construction for the Commission should have degaussing equipment. Specifications for the degaussing equipment for Hull 123, later known as the S.S. Idaho, were furnished by the Navy Department which assumed and paid the cost of installation and all transportation charges. The Hull was delivered on September 8, 1941, and was operated as directed by the Maritime Commission or the War Shipping Administration.

(2) *Lumber for construction of a munitions plant.* In January and February, 1942, the plaintiff transported from plants in Washington to New Brighton, Minnesota, seven carloads of lumber shipped by various lumber companies, consigned to the United States Area Engineer, Twin Cities Ordnance Plant, % Foley Brothers, Inc., and Walbridge, Aldinger Company. The lumber was for the construction of the Twin Cities Ordnance Plant at New Brighton for manufacture of .30 and .50 caliber ammunition under a cost-plus-fixed-fee construction and operation contract entered into in July, 1941, by the War Department with the Federal Cartridge Corporation of Minneapolis, Minnesota. Foley Brothers, Inc., and Walbridge, Aldinger Company were sub-contractors for construction.

(3) *Lumber for construction of pontoons.* In May, 1943, plaintiff transported from Bucoda, Washington, to Minneapolis, Minnesota, 113,120 pounds of fir lumber shipped by Mutual Lumber Company, consigned to Depot Quartermaster, % Crown Iron Works, for United States Marine [fol. 54] Corps. The lumber was shipped to be urea salts treated, kiln dried, milled and manufactured into trestle balks and pontoon balks, sills and chess, at Crown Iron Works pursuant to a contract with the corporation. The trestle and pontoon balks were shipped overseas for construction of a bridge for use in military operation or were used in construction of pontoon bridges and piers at Camp Lejeune, North Carolina, and Quantico, Virginia, for training combat engineers.

(4) *Bowling alleys.* On February 13, 1942, plaintiff and connecting carriers transported from Muskegon, Michigan, to Seattle, Washington, 29,037 pounds of bowling alley outfits, shipped by Inspector of Naval Material consigned to the Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to a Naval Air Base, Dutch Harbor, Alaska. The land on which the air base was constructed was reserved for Navy use. The alleys were procured on a contractor's purchase order and installed in a building at Dutch Harbor. The building was intended for a recreation center for the contractor's men and later as a recreation center for the military personnel at the station.

(5) *Liquid paving asphalt.* On January 26, 1942, plaintiff and connecting carrier transported from Richmond, California, to Seattle, Washington, 1,259 barrels of liquid paving asphalt consigned to Civil Aeronautics Administrator, Alaska Project Warehouse, Seattle, Washington, for export. The asphalt was for use in constructing runways at an airport at Cold Bay, Alaska, under a program entitled "Development of Landing Areas for National Defense," conducted by the Civil Aeronautics Administration. The land on which the airport was constructed at Cold Bay was owned by the United States and reserved for the use of the Navy by executive order. On December 15, 1941, Major General S. B. Buckner, Jr., Headquarters, Alaska Defense Command, Fort Richardson, Alaska, advised the Civil Aeronautics Administration that the field at Cold Bay was vital to the immediate defense of key points in Alaska, and in his letter of that day listing order of priority for the preparation of air fields in Alaska, he placed the Cold Bay project first in importance. At the time of the invasion of the Aleutians by the Japanese, the field at Cold Bay played an important part in the defense of Alaska. [fol. 55] Bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor.

The property was transported on Government bills of lading or commercial bills subsequently exchanged for Government bills. The amount claimed on five shipments is $3,569.75.

The District Court rendered an opinion holding that each of the above shipments was "military or naval property"

within the meaning of Section 321, and from the judgment following this opinion, the Northern Pacific Railway Company appeals.

Prior to the passage of the Transportation Act of 1940, all property owned by the United States moved over land grant routes at land grant rates. From time to time, the Congress has passed legislation relieving the railroads of the obligation to give to the Government certain preferential treatment in rates.[2] The Transportation Act of 1940 carried this legislative tendency further. It provided in Section 321(a):

> "Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty."

At the time of the enactment of the Transportation Act of 1940, it was obvious that the general needs of security demanded a greatly expanded Army and Navy. Such enlarged military and naval forces would demand supplies and equipment far in excess of the then existing reserves. With the war spreading throughout Europe in 1940, and with the knowledge of the meagre and inadequate military strength of the United States, it is most unrealistic to [fol. 56] presume that Congress intended any restrictive meaning of "military and naval property" as used in the Transportation Act of that crucial year. To define "military and naval property" in any narrow sense would be to close one's eyes to the complexities and realities of modern war. We will not impute to Congress such lack of vision.

---

[2] Act of July 16, 1892 (27 Stat. 174, 180); The Army Appropriation Act of June 7, 1924 (43 Stat. 486).

We must remember that all government property moving over land grant railways moved at the reduced land grant rates before Section 321(a) was introduced. As originally drawn, Section 321(a) would have made all government property moving over land grant railways move at the regular commercial rates as paid on non-land grant railways. In the Interstate Commerce Committee of the Senate, an exception was inserted which retained the reduced land grant rates on "military or naval property of the United States moving for military or naval and not for civil use." The use to which the property was to be put was the controlling thing. If the property was to be used for military or naval purposes as distinguished from a civil use, the property was military and naval property within the meaning of the Act. We look to the use to which the property was to be put to determine its character for rate paying purposes.

When this Act was passed, Congress was engaged in strengthening our defenses. War was imminent. Congress intended to save from the release of applicable land grant rates whatever of government property was shipped over land grant railways to be *used* by the United States in its military and naval security program. This exception was written for the benefiit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress. All property *used* for military or naval purposes was excepted from the whole category of government-owned properties that had theretofore enjoyed the low rates prevailing on land grant railways, and for those excepted properties the low rates were to continue. That the properties transported and here in question were used for military or naval purposes is apparent from a reading of the descriptions of the *use* to which they were put by the United States. Congress acted while total war raged in Europe and in contemplation of our situation if total war should come to us, which it did. Bowling alleys were used to maintain morale in the far-away Aleutian [fol. 57] Islands where a post of our military and naval forces was established. An Army and Navy cannot long live and fight in foreign lands and waters without a merchant fleet in support, and the protection of that fleet by the use of copper cable is a military and naval purpose. Lumber to make pontoons for training and use of Marines, and materials to make arsenals, were all for military and

naval uses. Any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways, it was a kind of property Congress did not release from the low rates granted by the land grant railways.

Counsel cites *Powell* v. *United States*, 60 F. Supp. 433, 152 F. 2d 228. In this case the United States had shipped phosphate to the British Ministry of Transport to be sent under lend-lease to Britain to be used by farmers there as fertilizer. The Court found that lend-lease goods were divided into three classes: (1) military, (2) industrial, and (3) agricultural. The use here was agricultural and civil as distinguished from military and naval.

Plaintiff contends that the Transportation Act of 1940 is *in pari materia* with the Embargo Act of 1940, the Property Requisitioning Act of 1941, and the National Defense Act of 1941. Plaintiff further argues that since the description of "war materials" is more comprehensive in these Acts than in the Transportation Act, Congress necessarily intended to restrict the meaning of "military and naval property" as used in this Act. We disagree with both contentions. Bouvier's Law Dictionary defines "*in pari materia*" as "upon the same matter or subject." The doctrine is applicable when construing contemporaneous legislation concerned with a specific subject, such as appropriations,[3] railroad rates,[4] and taxes.[5] It is obvious that the Transportation Act of 1940, dealing with railroad rates, is not concerned with the same subject matter as other defense measures so as to call for the application of the rule. Furthermore, the rule of *in pari materia* is resorted to only in cases where the meaning of a statute is ambiguous or doubtful. *District of Columbia* v. *Gladding*, [fol. 58] 263 Fed. 628; *United States* v. *Colorado Northwestern Railroad Company*, 157 Fed. 321, 330. No such situation is presented here.

It is ordered that the judgment of the District Court is Affirmed.

[File endorsement omitted.]

---

[3] *Converse* v. *United States*, 62 U. S. 463, 21 Howard 463, 16 L. Ed. 192.

[4] *United States* v. *State of Louisiana*, 290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 181.

[5] *First National Bank* v. *United States*, 25 F. Supp. 816.

In United States Circuit Court of Appeals, Seventh Circuit

9043

Northern Pacific Railway Company, Plaintiff-Appellant

vs.

The United States of America, Defendant-Appellee

Judgment—July 8, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] Supreme Court of the United States

Order Allowing Certiorari—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 57, U. S. vs. Atlantic Coast Line R. R. Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 51264. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 400. Northern Pacific Railway Company, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed August 14, 1946. Term No. 400, O. T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 14 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

LORENZO B. daPONTE,
MARCELLUS L. COUNTRYMAN, JR.,
1018 Northern Pacific Ry. Bldg.,
St. Paul, Minnesota,
Attorneys for Petitioner.